MARK MILLER
WISCONSIN STATE SENATOR
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SB563 Wrongful Death

Under current law an aggrieved party is allowed to sue for wrongful death within three years after the death of the injured party. A recent Supreme Court decision interpreted current law to grant an exception to this provision if the wrongful death occurred as a result of medical malpractice. Under the court's 2009 decision in Estate of Robert O Genrich v OHIC Insurance Company, if death occurs as a result of medical malpractice, the suit for wrongful death must be commenced within three years of the date of injury.

This decision creates the untenable outcome that the estate of a person who lingers more than three years after an injury resulting from medical malpractice can never sue for wrongful death.

This bill seeks to remedy the unequal treatment of wrongful death victims by clarifying that the clock starts ticking for all wrongful death suits on the date of death.

This bill is consistent with the minority dissent, authored by Justice Crooks and joined by Justice Bradley and Chief Justice Abrahamson.

I am not an attorney. Most of you are. But the result of the Court's decision is an unjust. All parties who seek to establish wrongful death should have the same opportunity to present their case.

Thank you for your consideration.

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PUBLIC HEARING ON
SENATE BILL 563
APRIL 1, 2010

TESTIMONY OF
KEITH R. CLIFFORD
ON BEHALF OF THE
WISCONSIN ASSOCIATION FOR JUSTICE

My name is Keith R. Clifford. I am a partner in the Clifford & Raihala law firm in Madison, Wisconsin and a past president of the Wisconsin Association for Justice. Thank you for the opportunity to testify. I am here today to testify in favor of Senate Bill 563, but will raise some reservations about the current bill.

It has long been the law in Wisconsin that a wrongful death claim begins on the date of death. However, the majority opinion in *Estate of Genrich v. OHIC Ins. Co., et al.*, 2009 WI 67, held that was not the case in a medical malpractice case. Instead, the Court ruled the medical malpractice wrongful death cause of action begins when the injury occurs. As Justice Crooks noted in his dissent in *Genrich*, "The approach adopted by the majority in this case — that a three-year statute of limitations on a wrongful death claim somehow runs before three years have elapsed after the date of death — unfortunately may foster a public perception that common sense sometimes is lacking in court decisions."

It seems too simplistic to say, but in order to have a wrongful death claim someone must have died. However, the majority on the Supreme Court said that was not the case. This could lead to the absurd result of someone being injured in a hospital, languishing for three years and one day and then dying. Under *Genrich*,

the statute of limitations for the injury would already run by the date of death so it was already too late to file a wrongful death claim. This lacks common sense.

Not only is this nonsensical, it only applies in medical malpractice cases. The majority of the court once again carved out an exception for the medical profession. It smacks of inequality to treat someone who dies as a result of medical malpractice different than someone who dies as the result of a car accident. The legislature should ensure that when someone dies due to the negligence of another, the same time to file a claim applies in every instance.

That is why we support the basic principle behind Senate Bill 563. However we believe that the bill suffers from two major problems. First, in Section 2, the claim is limited to Wis. Stat. § 895.03. What about the spouse's/dependent children's claims for loss of support and/or loss of society and companionship? By only referencing Wis. Stat. § 895.03 and not also § 895.04, this proposed change creates an ambiguity.

Second, you still have the problem of a person who may die more than 3 years after an injury meaning the wrongful death claim would have to be filed less than 3 years from the date of death. You have created a statute of repose, not a statute of limitations.

Statutes of limitation require persons who are injured to sue promptly. Statutes of repose eliminate the right to sue after a certain time period, even if the wrong occurred, but the person has experienced no damage, a prerequisite of a negligence claim.

What is the difference between a statute of limitation and a statute of repose?

A statute of limitation presumes that the claimant *has knowledge* of the wrong and injury and the statute limits the time in which the claimant, armed with such knowledge must act.

Statutes of repose, by contrast, have no regard for whether a cause of action has occurred. Such statutes can cut off a right of action before the injured party has (a) suffered an injury or damage or (b) becomes aware of the relationship between the injury and its cause. Under a statute of repose, the courthouse doors may be locked to claimants who have exercised due diligence and who have a meritorious claim.

The Wisconsin Supreme Court noted the incongruity of a statute of repose in *Funk v. Wollin Silo & Equipment, Inc.*, 435 N.W. 2d 244 (Wis. 1989) when it declared the architects and builders' statute of repose unconstitutional:

> Except in a topsy-turvy land, you can't die before you are conceived, or be divorced before you ever marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of legal "axiom" that a statute of limitations does not begin to run against a cause of action before that action exists, *i.e.*, before a judicial remedy is available to the plaintiff. *Quoting Dincher v. Marlin Firearms Co.* 198 F.2d 821 (2nd Cir. 1952) (J. Frank dissenting opinion.)

We believe SB 563 leaves in place the problem that resulted in the decision in *Genrich*: the fact that Wis. Stat. §893.55(1m) still only refers to injury and not to death. We believe the better approach is to simply amend Wis. Stat. § 893.55(1m) by distinguishing between injury and death cases. This would recognize that a death case is under the same statute of limitation as an injury case, not an exception to it, and it would not create a statute of repose.

> § 893.55 **(1m)** Except as provided by subs. (2) and (3), an action to recover damages for injury <u>or death</u> arising from any treatment or operation performed by, or from any omission by, a person who is a health care provider, regardless of the theory on which the action is based, shall be commenced within the later of:
>
> a. Three years from the date of the injury <u>in a non-death case</u>, or
> b. <u>Three years from the date of the death in a wrongful death case</u>, or
> c. One year from the date the injury was discovered or, in the exercise of reasonable diligence should have been discovered, except that an action may not be commenced under this paragraph more than 5 years from the date of the act or omission.

Thank you for the opportunity to testify today.

Wisconsin Medical Society

Your Doctor. Your Health.

TO: Senate Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform and Housing

FROM: Mark Grapentine, JD – Senior Vice President, Government Relations

DATE: April 1, 2010

RE: Opposition to Senate Bill 563

On behalf of nearly 12,500 members statewide, the Wisconsin Medical Society thanks you for this opportunity to register our opposition to Senate Bill 563.

In its analysis of the bill, which overturns Wisconsin Supreme Court case *Estate of Genrich v. OHIC Ins. Co.*(2009) less than a year after the opinion was issued, the Society has specific concerns regarding the potential effects SB 563 would have on the state's medical liability climate:

- **The bill opens the door to the possibility of a second round of cases being filed (round one—at time of injury, round two—at time of for death).**
  In our consultation with medical liability attorneys regarding SB 563, the most significant concern was that the bill could create a situation which two rounds of cases are filed. This has the potential to expose Society members to additional liability and remains a huge unknown in terms of how many injury cases would ultimately end up having two rounds, especially when there is a long gap between injury and death.

- **The current statute of repose for Wisconsin medical malpractice cases is five (5) years. This bill, according to our analysis, will create a six (6) year statute of repose.**
  This is not in line with the five (5) year limitation currently set forth in other areas of Wisconsin medical malpractice law. At a minimum, the bill should be amended to bring this provision into consistency with other medical liability statutes.

The Society is also concerned with any legislation increasing physicians' potential medical liability exposure, as this results in increased liability insurance premiums. Even as we continue to estimate the full effects of new federal health care reform, concerns remain that those reforms will not "bend the cost curve." This legislation will not decrease health care costs – indeed, it can do nothing but increase medical liability premiums for all physicians, adding to the administrative costs of health care.

Thank you again for this opportunity. If you have any questions on this or any other issue, please feel free to contact us at any time.

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of a payment of any principal or interest made by any person, but no endorsement or memorandum of any such payment, written or made upon any promissory note, bill of exchange or other writing, by or on behalf of the party to whom the payment is made or purports to be made, is sufficient proof of the payment so as to take the case out of the operation of this chapter.

History: Sup. Ct. Order, 67 Wis. 2d 585, 784 (1975); 1979 c. 323.

Judicial Council Committee's Note, 1979: This section is previous s. 893.46 renumbered for more logical placement in restructured ch. 893. [Bill 326–A]

893.49 Payment by one not to affect others. If there are 2 or more joint contractors or joint personal representatives of any contractor, no one of them shall lose the benefit of this chapter so as to be chargeable by reason only of any payment made by any other of them.

History: 1979 c. 323; 2001 a. 102.

Judicial Council Committee's Note, 1979: This section is previous s. 893.47 renumbered for more logical placement in restructured ch. 893. [Bill 326–A]

893.50 Other actions. All personal actions on any contract not limited by this chapter or any other law of this state shall be brought within 10 years after the accruing of the cause of action.

History: 1979 c. 323.

Judicial Council Committee's Note, 1979: This section is previous s. 893.26 renumbered for more logical placement in restructured ch. 893. [Bill 326–A]

SUBCHAPTER V

TORT ACTIONS

893.51 Action for wrongful taking of personal property. (1) Except as provided in sub. (2), an action to recover damages for the wrongful taking, conversion or detention of personal property shall be commenced within 6 years after the cause of action accrues or be barred. The cause of action accrues at the time the wrongful taking or conversion occurs, or the wrongful detention begins.

(2) An action under s. 134.90 shall be commenced within 3 years after the misappropriation of a trade secret is discovered or should have been discovered by the exercise of reasonable diligence. A continuing misappropriation constitutes a single claim.

History: 1979 c. 323; 1985 a. 236.

Judicial Council Committee's Note, 1979: This section is based on previous s. 893.19 (6), without change in substance, but with some expansion of language to make clear that accrual of the cause of action is not delayed until the person bringing the action learns of the wrongful taking or detention. An action for recovery of the personal property is subject to s. 893.35 which is also based on previous s. 893.19 (6). [Bill 326–A]

An action for inverse condemnation resulting from the removal of groundwater from a property was not an action for taking of personal property. Groundwater is more akin to real property than it is to personal property, especially because ch. 32 defines "property" as an all–encompassing term that includes estates in lands, fixtures, and personal property directly connected with lands. The court correctly proceeded under s. 893.52. E–L Enterprises, Inc. v. Milwaukee Metropolitan Sewerage District, 2009 WI App 15, 316 Wis. 2d 280, 763 N.W.2d 231, 08–0921.

893.52 Action for damages for injury to property. An action, not arising on contract, to recover damages for an injury to real or personal property shall be commenced within 6 years after the cause of action accrues or be barred, except in the case where a different period is expressly prescribed.

History: 1979 c. 323.

Judicial Council Committee's Note, 1979: This section is based upon previous s. 893.19 (5) which is split into 2 separate provisions. See s. 893.53 for the other provision. [Bill 326–A]

Section 893.19 (5) [now s. 893.52] applies to actions based on negligent construction of dwellings. The statute begins to run when the plaintiff suffers injury. Abramowski v. Wm. Kilps Sons Realty, Inc. 80 Wis. 2d 468, 259 N.W.2d 306 (1977).

The limitation period begins when evidence of resultant injury is sufficiently significant to alert the injured party to the possibility of a defect. Tallmadge v. Skyline Construction, Inc. 86 Wis. 2d 356, 272 N.W.2d 404 (Ct. App. 1978).

In actions for legal malpractice, the date of injury, rather than the date of the negligent act, commences the period of limitations. Auric v. Continental Casualty Co. 111 Wis. 2d 507, 331 N.W.2d 325 (1983).

A cause of action accrues when the negligent act occurs, or the last in a continuum of negligent acts occur, and the plaintiff has a basis for objectively concluding that the defendant caused injuries and damages. Koplin v. Pioneer Power & Light, 162 Wis. 2d 1, 469 N.W.2d 595 (1991).

This section permits parties to contract for lesser limitations periods and to specify the day the period begins to run, in which case the "discovery rule" does not apply. Keiting v. Skauge, 198 Wis. 2d 887, 543 N.W.2d 565 (Ct. App. 1995), 95–2259.

A claim for asbestos property damage accrues when the plaintiff is informed of the presence of asbestos and that precautions are necessary. Banc One Building Management Corp. v. W.R. Grace Co. 210 Wis. 2d 62, 565 N.W.2d 154 (Ct. App. 1997), 95–3193.

In the case of a claim for faulty workmanship, a builder's representation can result in a justifiable delay in discovering the cause of an injury. Whether the plaintiff's course of conduct is reasonable is a question of fact. Williams v. Kacrek Builders, Inc. 212 Wis. 2d 150, 568 N.W.2d 313 (Ct. App. 1997), 96–2396.

A plaintiff can rely on the discovery rule only if he or she has exercised reasonable diligence. Jacobs v. Nor–Lake, 217 Wis. 2d 625, 579 N.W.2d 254 (Ct. App. 1998), 97–1740.

A party's deficient performance of a contract does not give rise to a tort claim. There must be a duty independent of the contract for a cause of action in tort. Atkinson v. Everbrite, Inc. 224 Wis. 2d 724, 592 N.W.2d 299 (Ct. App. 1999), 98–1806.

The accrual of a stray voltage claim is governed by the discovery rule. When the defendant utility went to the farm 3 times and found no problem, the plaintiff could not be faulted for accepting the results of the utility's testing and continuing to search for other possible sources of the problem. Allen v. Wisconsin Public Service Corporation, 2005 WI App 40, 279 Wis. 2d 488, 694 N.W.2d 420, 03–2690.

An action for inverse condemnation resulting from the removal of groundwater from a property was not an action for taking of personal property. Groundwater is more akin to real property than it is to personal property, especially because ch. 32 defines "property" as an all–encompassing term that includes estates in lands, fixtures, and personal property directly connected with lands. The court correctly proceeded under s. 893.52. E–L Enterprises, Inc. v. Milwaukee Metropolitan Sewerage District, 2009 WI App 15, 316 Wis. 2d 280, 763 N.W.2d 231, 08–0921.

893.53 Action for injury to character or other rights. An action to recover damages for an injury to the character or rights of another, not arising on contract, shall be commenced within 6 years after the cause of action accrues, except where a different period is expressly prescribed, or be barred.

History: 1979 c. 323.

Judicial Council Committee's Note, 1979: This section is based upon previous s. 893.19 (5) which is split into 2 provisions. See s. 893.52 for the other provision. [Bill 326]

This section applies to legal malpractice actions that sound in tort. Acharya v. Carroll, 152 Wis. 2d 330, 448 N.W.2d 275 (Ct. App. 1989).

The application of the discovery rule to legal malpractice actions is discussed. Hennekens v. Hoerl, 160 Wis. 2d 144, 465 N.W.2d 812 (1991).

This section and the discovery rule apply to engineering malpractice actions. Milwaukee Partners v. Collins Engineers, 169 Wis. 2d 355, 485 N.W.2d 274 (Ct. App. 1992).

This section is the state's general and residual personal injury statute of limitations and is applicable to 42 USC 1983 actions. Hemberger v. Bitzer, 216 Wis. 2d 509, 574 N.W.2d 656 (1998), 96–2973.

A party's deficient performance of a contract does not give rise to a tort claim. There must be a duty independent of the contract for a cause of action in tort. Atkinson v. Everbrite, Inc. 224 Wis. 2d 724, 592 N.W.2d 299 (Ct. App. 1999), 98–1806.

Even though a plaintiff might plead and testify to having suffered emotional distress on account of a lawyer's malpractice, that fact does not convert the claim into one seeking redress for injuries to the person. The underlying injuries in a legal malpractice claim are to rights and interests of a plaintiff that go beyond, or at least are different from, injuries to his or her person under s. 893.54. Hicks v. Nunnery, 2002 WI App 87, 253 Wis. 2d 721, 643 N.W.2d 809, 01–0751.

The residual or general personal injury statute of limitations applies to 42 USC 1983 actions. Owens v. Okure, 488 U.S. 235, 102 L. Ed. 2d 594 (1989).

This section applies to actions under Title II of the Americans With Disabilities Act. Doe v. Milwaukee County, 871 F. Supp. 1072 (1995).

Cross Reference: See also the notes to 893.54 for additional treatments of 42 USC 1983.

893.54 Injury to the person. The following actions shall be commenced within 3 years or be barred:

(1) An action to recover damages for injuries to the person.

(2) An action brought to recover damages for death caused by the wrongful act, neglect or default of another.

History: 1979 c. 323.

Judicial Council Committee's Note, 1979: This section is derived from previous s. 893.205 but was amended to eliminate language now covered by newly created s. 893.07. (See note to s. 893.07). [Bill 326–A]

Because the parents' claim arising from an injury to their minor child was filed along with the child's claim within the time period for the child's claim under s. 893.18, the parents' claim was not barred by s. 893.54. Korth v. American Family Insurance Co. 115 Wis. 2d 326, 340 N.W.2d 494 (1983).

This section and s. 893.80 both apply to personal injury actions against governmental entities. Schwetz v. Employers Insurance of Wausau, 126 Wis. 2d 32, 374 N.W.2d 241 (Ct. App. 1985).

When a plaintiff's early subjective lay person's belief that a furnace caused the injury was contradicted by examining physicians, the cause of action against the furnace company did not accrue until the plaintiff's suspicion was confirmed by later medical diagnosis. Borello v. U.S. Oil Co. 130 Wis. 2d 397, 388 N.W.2d 140 (1986).

While adoptive parents were aware of the possibility that their child might develop a disease in the future, a cause of action did not accrue until the child was diagnosed as having the disease. Meracle v. Children's Service Society, 149 Wis. 2d 19, 437 N.W.2d 532 (1989).

When a doctor initially diagnosed a defective prosthesis, but advised surgery as the only way to determine what exactly was wrong, the plaintiff's cause of action against the prosthesis manufacturer accrued when the diagnosis was confirmed by surgery. S.J.D. v. Mentor Corp. 159 Wis. 2d 261, 463 N.W.2d 873 (Ct. App. 1990).

A brain damaged accident victim's cause of action accrued when the victim discovered, or when a person of the same degree of mental and physical handicap under the same or similar circumstances should have discovered, the injury, its cause and nature, and the defendants' identities. Carlson v. Pepin County, 167 Wis. 2d 345, 481 N.W.2d 498 (Ct. App. 1992).

Claimed ignorance of, and a blatant failure to follow, applicable regulations cannot be construed as reasonable diligence in discovering an injury when following the rule would have resulted in earlier discovery. Stroh Die Casting v. Monsanto Co. 177 Wis. 2d 91, 502 N.W.2d 132 (Ct. App. 1993).

The discovery rule does not allow a plaintiff to delay the statute of limitations until the extent of the injury is known. The statute begins to run when the plaintiff has sufficient evidence that a wrong has been committed by an identified person. Pritzlaff v. Archdiocese of Milwaukee, 194 Wis. 2d 303, 533 N.W.2d 780 (1995).

A claim of repressed memory does not indefinitely toll the statute of limitations nor delay the accrual of a cause of action, regardless of the victim's minority or the position of trust occupied by the alleged perpetrator. Doe v. Archdiocese of Milwaukee, 211 Wis. 2d 312, 565 N.W.2d 94 (1997), 94–0423.

Parents' claims for injury resulting from the sexual assault of their child accrue when the child's claims accrue, regardless of when the parents learn of their claims. Joseph W. v. Catholic Diocese of Madison, 212 Wis. 2d 925, 569 N.W.2d 795 (Ct. App. 1997), 96–2220.

Section 893.53 is the state's general and residual personal injury statute of limitations and is applicable to 42 USC 1983 actions. Hemberger v. Bitzer, 216 Wis. 2d 509, 574 N.W.2d 656 (1998), 96–2973.

The diagnosis of a non–malignant asbestos–related lung pathology does not trigger the statute of limitations with respect to a later–diagnosed, distinct malignant asbestos–related condition. Because the malignancy could not have been predicted when an earlier action relating to the non–malignant condition was dismissed on the merits, the doctrine of claims preclusion was not applied to bar the plaintiff's action. Sopha v. Owens–Corning Fiberglass Corporation, 230 Wis. 2d 212, 601 N.W.2d 627 (1999), 98–1343.

The statute of limitations for subrogation claims is the statute of limitations on the underlying tort. Schwittay v. Sheboygan Falls Mutual Insurance Co. 2001 WI App 140, 246 Wis. 2d 385, 630 N.W.2d 772, 00–2445.

Even though a plaintiff might plead and testify to having suffered emotional distress on account of a lawyer's malpractice, that fact does not convert the claim into one seeking redress for injuries to the person. The underlying injuries in a legal malpractice claim are to rights and interests of a plaintiff that go beyond, or at least are different from, injuries to his or her person under s. 893.54. Hicks v. Nunnery, 2002 WI App 87, 253 Wis. 2d 721, 643 N.W.2d 809, 01–0751.

Knowing that a particular product caused an injury, an injured party cannot extend the accrual date for a cause of action against the product's manufacturer due to the subsequent discovery of possible connections between that product and another manufacturer's product in causing the injury. Baldwin v. Badger Mining Corporation & Mine Safety Appliances Co. 2003 WI App 95, 264 Wis. 2d 301, 663 N.W.2d 382, 02–1197.

Claims of negligent supervision made against an Archdiocese for injuries caused by sexual assaults by priests are derivative of the underlying sexual molestations by the priests. As claims for injuries resulting from sexual assault accrue by the time of the last incident of sexual assault, the derivative claims accrued, as a matter of law, by the time of the last incident of sexual assault. John Doe v. Archdiocese of Milwaukee, 2007 WI 95, 303 Wis. 2d 34, 734 N.W.2d 827, 05–1945.

A derivative claim for damages due to wrongful death is controlled by the specific statute of limitations for medical malpractice, s. 893.55, rather than the general wrongful death statute of limitations, s. 893.54, and accrues on the same date as the medical negligence action on which it is based — the date of injury, not the date of death. Estate of Genrich v. OHIC Insurance Company, 2009 WI 67, ___ Wis. 2d ___, 769 N.W.2d 481, 07–0541.

When an action to recover damages for injuries to the person is commenced as a counterclaim pursuant to s. 893.14, the statute of limitations established by this section applies. Donaldson v. West Bend Mutual Insurance Company, 2009 WI App 134, ___ Wis. 2d ___, 773 N.W.2d 470, 08–2289.

Federal civil rights actions under 42 USC 1983 are best characterized as personal injury actions. Wilson v. Garcia, 471 U.S. 261 (1985).

The residual or general personal injury statute of limitations applies to 42 USC 1983 actions. Owens v. Okure, 488 U.S. 235, 102 L. Ed. 2d 594 (1989).

See also notes to s. 893.53 for additional treatments of 42 USC 1983.

893.55 Medical malpractice; limitation of actions; limitation of damages; itemization of damages. (1d) (a) The objective of the treatment of this section is to ensure affordable and accessible health care for all of the citizens of Wisconsin while providing adequate compensation to the victims of medical malpractice. Achieving this objective requires a balancing of many interests. Based upon documentary evidence, testimony received at legislative hearings, and other relevant information, the legislature finds that a limitation on the amount of noneconomic damages recoverable by a claimant or plaintiff for acts or omissions of a health care provider, together with mandatory liability coverage for health care providers and mandatory participation in the injured patients and families compensation fund by health care providers, while compensating victims of medical malpractice in appropriate circumstances by the availability of unlimited economic damages, ensures that these objectives are achieved. Establishing a limitation on noneconomic damage awards accomplishes the objective by doing all of the following:

1. Protecting access to health care services across the state and across medical specialties by limiting the disincentives for physicians to practice medicine in Wisconsin, such as the unavailability of professional liability insurance coverage, the high cost of insurance premiums, large fund assessments, and unpredictable or large noneconomic damage awards, as recognized by a 2003 U.S. congress joint economic committee report, a 2003 federal department of health and human services study, and a 2004 office of the commissioner of insurance report.

2. Helping contain health care costs by limiting the incentive to practice defensive medicine, which increases the cost of patient care, as recognized by a 2002 federal department of health and human services study, a 2003 U.S. congress joint economic committee report, a 2003 federal government accounting office study, and a 2005 office of the commissioner of insurance report.

3. Helping contain health care costs by providing more predictability in noneconomic damage awards, allowing insurers to set insurance premiums that better reflect such insurers' financial risk, as recognized by a 2003 federal department of health and human services study.

4. Helping contain health care costs by providing more predictability in noneconomic damage awards in order to protect the financial integrity of the fund and allow the fund's board of governors to approve reasonable assessments for health care providers, as recognized by a 2005 legislative fiscal bureau memo, a 2001 legislative audit bureau report, and a 2005 office of commissioner of insurance report.

(b) The legislature further finds that the limitation of $750,000 represents an appropriate balance between providing reasonable compensation for noneconomic damages associated with medical malpractice and ensuring affordable and accessible health care. This finding is based on actuarial studies provided to the legislature, the experiences of other states with and without limitations on noneconomic damages associated with medical malpractice, the testimony of experts, and other documentary evidence presented to the legislature.

(c) Based on actuarial studies, documentary evidence, testimony, and the experiences of other states, the legislature concludes there is a dollar figure so low as to deprive the injured victim of reasonable noneconomic damages, and there is a dollar figure at which the cap number is so high that it fails to accomplish the goals of affordable and accessible health care. The legislature concludes that the number chosen is neither too high nor too low to accomplish the goals of affordable and accessible health care, is a reasonable and rational response to the current medical liability situation, and is reasonably and rationally supported by the legislative record.

(1m) Except as provided by subs. (2) and (3), an action to recover damages for injury arising from any treatment or operation performed by, or from any omission by, a person who is a health care provider, regardless of the theory on which the action is based, shall be commenced within the later of:

(a) Three years from the date of the injury, or

(b) One year from the date the injury was discovered or, in the exercise of reasonable diligence should have been discovered, except that an action may not be commenced under this paragraph more than 5 years from the date of the act or omission.

(2) If a health care provider conceals from a patient a prior act or omission of the provider which has resulted in injury to the patient, an action shall be commenced within one year from the date the patient discovers the concealment or, in the exercise of reasonable diligence, should have discovered the concealment or within the time limitation provided by sub. (1m), whichever is later.

(3) When a foreign object which has no therapeutic or diagnostic purpose or effect has been left in a patient's body, an action shall be commenced within one year after the patient is aware or,

in the exercise of reasonable care, should have been aware of the presence of the object or within the time limitation provided by sub. (1m), whichever is later.

(4) (a) In this subsection, "noneconomic damages" means moneys intended to compensate for pain and suffering; humiliation; embarrassment; worry; mental distress; noneconomic effects of disability including loss of enjoyment of the normal activities, benefits and pleasures of life and loss of mental or physical health, well–being or bodily functions; loss of consortium, society and companionship; or loss of love and affection.

(b) The total noneconomic damages recoverable for bodily injury, including any action or proceeding based on contribution or indemnification and any action for a claim by a person other than the injured person for noneconomic damages recoverable for bodily injury, may not exceed the limit under par. (d) for each occurrence on or after April 6, 2006, from all health care providers and all employees of health care providers acting within the scope of their employment and providing health care services who are found negligent and from the injured patients and families compensation fund.

(c) A court in an action tried without a jury shall make a finding as to noneconomic damages without regard to the limit under par. (d). If noneconomic damages in excess of the limit are found, the court shall make any reduction required under s. 895.045 and shall award as noneconomic damages the lesser of the reduced amount or the limit. If an action is before a jury, the jury shall make a finding as to noneconomic damages without regard to the limit under par. (d). If the jury finds that noneconomic damages exceed the limit, the jury shall make any reduction required under s. 895.045 and the court shall award as noneconomic damages the lesser of the reduced amount or the limit.

(d) 1. The limit on total noneconomic damages for each occurrence under par. (b) on or after April 6, 2006, shall be $750,000.

2. The board of governors created under s. 619.04 (3) shall submit a report to the legislature as provided under s. 13.172 (2) by January 1 of every odd numbered year of any recommended changes to the limits on noneconomic damages established in subd. 1. The report shall include the reasons why the changes are necessary to meet the intent of the legislative findings under sub. (1d).

(e) Economic damages recovered under ch. 655 for bodily injury or death, including any action or proceeding based on contribution or indemnification, shall be determined for the period during which the damages are expected to accrue, taking into account the estimated life expectancy of the person, then reduced to present value, taking into account the effects of inflation.

(f) Notwithstanding the limits on noneconomic damages under this subsection, damages recoverable against health care providers and an employee of a health care provider, acting within the scope of his or her employment and providing health care services, for wrongful death are subject to the limit under s. 895.04 (4). If damages in excess of the limit under s. 895.04 (4) are found, the court shall make any reduction required under s. 895.045 and shall award the lesser of the reduced amount or the limit under s. 895.04 (4).

(5) Every award of damages under ch. 655 shall specify the sum of money, if any, awarded for each of the following for each claimant for the period from the date of injury to the date of award and for the period after the date of award, without regard to the limit under sub. (4) (d):

(a) Pain, suffering and noneconomic effects of disability.

(b) Loss of consortium, society and companionship or loss of love and affection.

(c) Loss of earnings or earning capacity.

(d) Each element of medical expenses.

(e) Other economic injuries and damages.

(6) Damages recoverable under this section against health care providers and an employee of a health care provider, acting within the scope of his or her employment and providing health care services, are subject to the provisions of s. 895.045.

(7) Evidence of any compensation for bodily injury received from sources other than the defendant to compensate the claimant for the injury is admissible in an action to recover damages for medical malpractice. This section does not limit the substantive or procedural rights of persons who have claims based upon subrogation.

History: 1979 c. 323; 1985 a. 340; 1995 a. 10; 2003 a. 111; 2005 a. 183; 2007 a. 96.

Judicial Council Committee's Note, 1979: This section has been created to precisely set out the time periods within which an action to recover damages for medical malpractice must be commenced. The time provisions apply to any health care provider in Wisconsin.

Sub. (1) contains the general time limitations for commencing a malpractice action. The subsection requires that such an action be commenced not later than 3 years from the event constituting the malpractice or not more than one year from the time the malpractice is discovered by the patient or should have been discovered by the patient. The patient has either the 3–year general time period or the one–year time period from the date of discovery, whichever is later. Subsection (1) further provides that in no event may a malpractice action be commenced later than 6 [5] years from the time of the alleged act or omission.

Subs. (2) and (3) provide 2 exceptions to the one–, three–, and six–year time limitations contained in subsection (1). Subsection (2) provides that when a health care provider becomes aware of an act or omission constituting possible malpractice and intentionally conceals the act or omission from the patient, the patient has one year from the time he or she discovers the concealment or should have discovered the concealment to commence a malpractice action.

Sub. (3) gives a patient one year from the time of discovery of a foreign object left in the patient's body or the time in which discovery should have occurred to commence a malpractice action. The subsection also contains a definition of a foreign object similar to the definition recently enacted by the state of California. [Bill 326–A]

The "continuum of negligent treatment" doctrine is not limited to a single negligent actor. Robinson v. Mt. Sinai Medical Center, 137 Wis. 2d 1, 402 N.W.2d 711 (1987).

While an unsubstantiated lay belief of an injury is not sufficient for discovery under sub. (1) (b), if the plaintiff has information that constitutes a basis for an objective belief of the injury and its cause, whether or not that belief resulted from "official" diagnosis from an expert, the injury and its cause are discovered. Clark v. Erdmann, 161 Wis. 2d 428, 468 N.W.2d 18 (1991).

A podiatrist is a "health care provider" under s. 893.55. Clark v. Erdmann, 161 Wis. 2d 428, 468 N.W.2d 18 (1991).

A physician's intentional improper sexual touching of a patient was subject to s. 893.57 governing intentional torts, not s. 893.55 governing medical malpractice. Deborah S.S. v. Yogesh N.G. 175 Wis. 2d 436, 499 N.W.2d 272 (Ct. App. 1993).

A blood bank is not a "health care provider." Doe v. American National Red Cross, 176 Wis. 2d 610, 500 N.W.2d 264 (1993).

Parents who did not obtain a medical opinion until more than 3 years after their child's death did not exercise reasonable diligence as required by the discovery rule under sub. (1) (b). Awve v. Physicians Ins. Co. 181 Wis. 2d 815, 512 N.W.2d 216 (Ct. App. 1994).

Minors may bring separate actions for loss of companionship when malpractice causes a parent's death, including when the decedent is survived by a spouse. Jelinik v. St. Paul Fire & Casualty Ins. Co. 182 Wis. 2d 1, 512 N.W.2d 764 (1994).

When continuous negligent treatment occurs, the statute begins to run from the date of last negligent conduct. The amount of time that passes between each allegedly negligent act is a primary factor in determining whether there has been a continuum of negligent care. Westphal v. E.I. du Pont de Nemours, 192 Wis. 2d 347, 531 N.W.2d 361 (Ct. App. 1995).

Punitive damages in malpractice actions are not authorized by sub. (5) (e). Lund v. Kokemoor, 195 Wis. 2d 727, 537 N.W.2d 21 (Ct. App. 1995), 95–0453.

Dentists are health care providers under this section. Ritt v. Dental Care Associates, S.C. 199 Wis. 2d 48, 543 N.W.2d 852 (Ct. App. 1995), 94–3344.

Once a person discovers or should have discovered an injury, nothing, including a misleading legal opinion, can cause the injury to become "undiscovered." Claypool v. Levin, 209 Wis. 2d 284, 562 N.W.2d 584 (1997), 94–2457.

The date of injury under sub. (1) (a) from a failed tubal ligation was the date on which the plaintiff became pregnant. Fojut v. Stafl, 212 Wis. 2d 827, 569 N.W.2d 737 (Ct. App. 1997), 96–1676.

This section applies to persons who are licensed by a state examining board and are involved in the diagnosis, treatment, or care of patients. Chiropractors fall within this definition. Arenz v. Bronston, 224 Wis. 2d 507, 592 N.W.2d 295 (Ct. App. 1999), 98–1357.

Optometrists are health care providers under this section. The coverage of this section is not restricted to those included under s. 655.002, but applies to all who provide medical care and are required to be licensed. Webb v. Ocularra, Inc. 2000 WI App 25, 232 Wis. 2d 495, 606 N.W.2d 552, 99–0979.

Sub. (4) (f) makes the limits on damages applicable to medical malpractice death cases, but does not incorporate classification of wrongful death claimants entitled to bring such actions, which is controlled by s. 655.007. As such, adult children do not have standing to bring such an action. The exclusion of adult children does not violate the guarantee of equal protection. Czapinski v. St. Francis Hospital, Inc. 2000 WI 80, 236 Wis. 2d 316, 613 N.W.2d 120, 98–2437.

Sub. (1) (b) does not violate Art. I, s. 9, of the state constitution, the right to remedy clause, nor does it offend equal protection or procedural due process principles. Aicher v. Wisconsin Patients Compensation Fund, 2000 WI 98, 237 Wis. 2d 99, 613 N.W.2d 849, 98–2955.